IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 22, 2008

# STATE OF TENNESSEE v. MICKEY MORRIS MURPHY

**Direct Appeal from the Circuit Court for Marshall County**
**No. 17449 Robert Crigler, Judge**

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**No. M2007-02835-CCA-R3-CD - Filed September 23, 2009**

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Defendant, Mickey Morris Murphy, was indicted for aggravated robbery, a Class B felony. On July 11, 2007, Defendant entered a plea of guilty to the lesser included offense of robbery, a Class C felony, with the length and manner of service of his sentence left to the trial court's determination. Following a sentencing hearing, the trial court sentenced Defendant as a Range I, standard offender, to five years, six months, to be served by incarceration. On appeal, Defendant challenges the trial court's sentencing determinations. After a thorough review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ., joined.

Donna Leigh Hargrove, District Public Defender; and Michael J. Collins, Assistant Public Defender, Shelbyville, Tennessee, for the appellant, Mickey Morris Murphy.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, the State of Tennessee.

## OPINION

### I. Background

At the guilty plea submission hearing, the State offered the following factual basis in support of Defendant's plea:

> The State's witnesses . . . would testify that these events occurred in Marshall County, Tennessee on or about December the 20th of 2006. It occurred in the north end of the county at a community or city known as Chapel Hill, Tennessee.

At that time [North Medical Clinic] was located up there on that date and Ms. Joy Sweeney was in the clinic at work . . . by herself. At approximately 8:30 a.m. the Defendant entered into the medical clinic lobby or office area wearing a black hooded, sweatshirt-type jacket. He asked Ms. Sweeney to use the rest room. The Defendant then entered the door going to the office area. He then came back out, and he took a can of mace, sprayed Ms. Sweeney. He then took a money bag which was located there on the desk near her which contained a large amount of money in cash and checks.

There was a witness there that saw a teal green type pickup truck parked at a place right down in behind the medical clinic known as the Country Diner. It is located fairly close to the medical clinic, but it is not in the area where you would typically park a vehicle to go the doctor's office.

The witness saw one white male who was later identified as Derek Hankins, who is a relative of the Defendant, driving that truck and sitting behind the wheel while [Defendant] got out of the truck and went to the doctor's office.

The witness saw [Defendant] come from the area of the doctor's office after he had sprayed Ms. Sweeney and taken the money. He came behind the buildings. She then, or the witness then, saw him get into the truck, and the truck left the area.

The witness described damage to the front bumper area of the truck and the passenger side of the truck.

At that time the police were called. Chapel Hill Police Department . . . and Marshall County Sheriff's Department responded. What the police call a ["]BOLO["] was put out and Deputy Rodney King of the Williamson County Sheriff's Department . . . saw a truck in Williamson County matching the description of the truck . . . and Deputy King made a traffic stop of the vehicle.

When the individuals were taken out of the vehicle a First State Bank bag was seen in plain view in the vehicle[,] and that is the bank bag that was later identified by Ms. Sweeney as being the bank bag that was there with her containing the money and checks . . . in the office.

[Deputy] King and another Chapel Hill officer went to Williamson County and transported both [Defendant] and Derek Hankins back to the Marshall County Jail. [Defendant] was spoken to at the Marshall County Jail.

At first I believe he refused or did not wish to discuss the situation, and a little later changed his mind[,] and he gave a written statement that says, ["]I walked into the North Medical Center, which is the clinic in question, walked up behind Joy

Sweeney, sprayed her with mace and took the bank bag; fled the scene with Derek Hankins.["]

It is signed by [Defendant] on [December 20, 2006].

The money was recovered on various searches of the vehicle. The money[] . . . was found in the door and various places in and about the truck.

During a voir dire examination by the State, Defendant acknowledged that he and his nephew, Mr. Hankins, drove to the medical center for the purpose of robbing the establishment. Defendant stated it was his idea to park the truck at the County Diner because he believed that the vehicle would not be spotted. Defendant stated that his doctor had his office in the clinic, and Defendant was afraid he would be recognized. Accordingly, Mr. Hankins made the first attempt to burglarize the clinic, but he could not obtain entry to the building. Approximately thirty to forty-five minutes after the first robbery attempt, Defendant exited the vehicle, robbed Ms. Sweeney, and then drove away from the scene in the truck.

The trial court explained the Constitutional rights which Defendant was foregoing by the entry of his plea of guilty, and the range of punishment for the offense of robbery. Defendant acknowledged that he understood and that he was voluntarily and knowingly entering his plea of guilty. The trial court accepted Defendant's plea of guilty to robbery.

A sentencing hearing was conducted on August 22, 2007. Beth Flatt, with the Tennessee Board of Probation and Parole, testified that she prepared Defendant's presentence report. Ms. Flatt said that Defendant was unmarried and thirty-five years old at the time the report was prepared. Ms. Flatt said that Defendant had never married. He had, however, three children by three different women, and he was behind in his child support responsibilities at the time the report was prepared. Defendant reported that he dropped out of high school in the tenth grade. Defendant denied using alcohol, but he told Ms. Flatt that he used marijuana between the ages of sixteen and twenty-five. Ms. Flatt stated that Defendant told her that he had taken Lortab in the past. Although Defendant reported no health problems in the report, Defendant said that the pills were prescribed by a physician whose office was in the North Medical Clinic.

Defendant reported that he was employed by Jennings Farms from January 1, 2005, to June 2, 2006 and then worked for Twin Cedar Logging from June 1, 2006 until his arrest. Defendant also reported various jobs as a logger and a security guard but did not provide the names of these employers. One of Ms. Flatt's co-workers verified that Defendant worked for the Bates Company for one day on February 5, 1999, not from June 1996 to May 2000, as Defendant originally reported.

Ms. Flatt said that her research revealed that Defendant had one misdemeanor conviction in Tennessee in 1998 for passing a worthless check. Defendant was sentenced to 212 days for this conviction. His sentence was suspended, and Defendant was placed on probation for six months.

In response to Ms. Flatt's request for a statement, Defendant wrote, "I allowed myself to get involved in an offense that I should have never been involved in."

Defendant testified that he entered the North Medical Clinic and stole a bank bag. Defendant said that he regretted the incident. Defendant stated that he voluntarily turned over the money in the bank bag to the investigating officers. When asked if he had learned a lesson from the incident, Defendant responded, "No doubt." Defendant said that he would be able to secure a job as a mechanic if he were granted probation.

On cross-examination, Defendant stated that it was his idea to rob the medical clinic. Defendant said that he dropped Mr. Hankins off at the medical clinic and picked him up behind the building. Initially, Defendant said that Mr. Hankins approached the medical clinic only to verify whether Defendant's physician was in the office or the door was unlocked. Then Defendant stated that Mr. Hankins tried "to go in first, then didn't want to do it."

Defendant stated that he walked up behind Ms. Sweeney and sprayed her with a personal defense spray. Defendant said that he did not believe the spray incapacitated Ms. Sweeney because Ms. Sweeney was able to give a description of Defendant to the investigating officers. Defendant acknowledged that he did not check to see if Ms. Sweeney was all right or if she needed medical assistance before he left the building. Defendant also acknowledged that the truck used in the commission of the offense belonged to his girlfriend, and that his girlfriend attempted to regain possession of the truck from the Marshall County's Sheriff's Department the day after the offense. Defendant admitted that some of the money taken during the robbery was still in the truck at that point in time.

Defendant conceded that he did not have any medical conditions that would warrant a prescription for Lortab. Defendant stated that he first went to see a physician at the medical center approximately two months before the incident, and that he returned every two weeks to have his prescription refilled. Defendant said that he paid fifty dollars to the clinic for each prescription refill.

Defendant said that after the robbery he believed that "[l]ife was going to be easy." Defendant acknowledged that he was in arrears on his child support obligations and owed between $25,000 and $35,000. Defendant explained, however, that the trial court did not order him to pay child support for one of his children until the child was four years old which meant that he was in arrears "from day one." Defendant maintained that he was current on his child support payments for the other two children, but that he had trouble meeting his obligations before 1999 because he "was out of work sometimes."

Defendant stated that he had not been arrested on any charges that were not reflected in the presentence report except for one occasion in 2000 when he was ordered to serve thirty days in jail because of the arrearage in his child support obligations, and one conviction in Hickman County in 2000 for passing a worthless check. Defendant stated that he was sentenced to eleven months,

twenty-nine days for the Hickman County conviction, but his sentence was suspended and he was placed on probation. Defendant acknowledged that he still owed court costs on that case.

The sentencing hearing was continued until October 3, 2007, and the State called its rebuttal witnesses. Ms. Flatt testified that after Defendant's first sentencing hearing, she confirmed that Defendant had been convicted of petty theft in Olmstead County, Minnesota, but she could not recollect the date of the offense. Defendant was fined $87.00 and ordered to pay restitution in the amount of $140.00. Ms. Flatt stated that she was informed that Defendant had not yet paid the fine in this case. Defendant was also convicted in 2003 of driving on a suspended license, failure to appear, and possession of drug paraphernalia in Fillmore County, Minnesota. Child Protective Services conducted an investigation of child abuse allegations against Defendant while he was living in Minnesota, but no charges were filed. Ms. Flatt stated that Defendant did not disclose any of these incidents at the time the presentence report was prepared.

Joy Sweeney, the victim, testified that she was alone in the North Medical Clinic on the day of the robbery. A bank bag containing cash, receipts, and some canceled checks was on her desk. Ms. Sweeney said that she always placed the bank bag on her desk each morning when the clinic was first opened, and the bag was visible to any patients who signed in at the counter in front of her desk. Ms. Sweeney said that her desk was approximately three feet from the clinic's front door. Ms. Sweeney stated that a man entered the clinic and asked to use the restroom. Ms. Sweeney assumed that man was a patient and directed him to walk through a door to the back of the building. Ms. Sweeney waited for the man to return so that she could pull his chart. Ms. Sweeney said that the man was in the rear of the building for approximately two minutes. Instead or reentering the waiting area through the door, however, the man walked up behind Ms. Sweeney and sprayed a substance in her face. Ms. Sweeney said that her eyes began to water and she experienced blurred vision, but she was able to call 911 because she knew where the numbers were on the telephone. Ms. Sweeney said that the man grabbed the bank bag and left the clinic at "a fast pace." Ms. Sweeney stated that she was not scared before the robbery, but felt fear after Defendant had left the building.

Ms. Sweeney stated that the bank bag contained over $10,000 in cash and approximately $2,000 in checks. Some of the money was Ms. Sweeney's personal funds which were earmarked for her son's education. Ms. Sweeney explained that the medical clinic was a small business, and that the loss of the use of that money was "a particularly great loss." Ms. Sweeney stated that she continued to experience a fear that someone would approach her from behind, and she always hesitated before entering the clinic.

Detective Bob Johnson, with the Marshall County Sheriff's Department, testified that the total amount of money recovered after the robbery was approximately $15,000, rather than the initially reported amount of $10,000, and that some of the money belonged to Ms. Sweeney instead of the medical clinic. Detective Johnson stated that the initial search of the vehicle revealed approximately $5,000. Defendant told Detective Johnson during his first interview that "he would not say anything that would incriminate himself." After this interview, Defendant's girlfriend made several telephone calls to the sheriff's department requesting the return of her truck. Detective

Johnson stated that Defendant only agreed to cooperate when he learned that the truck was going to be subjected to a search and would not be returned to Defendant's girlfriend until after the search was completed. Defendant told Detective Johnson that there was approximately $8,000 hidden in the vehicle's door panel.

The trial court found that Defendant was a Range I, standard offender, for sentencing purposes. As enhancement factors, the trial court considered Defendant's prior criminal history, his role as a leader in the commission of the offense, that the amount of property taken from the victim was particularly great, and the fact that Defendant treated the victim with exceptional cruelty during the commission of the offense. See T.C.A. § 40-35-114(1), (2), (5), and (6). The trial court assigned great weight to Defendant's role as a leader during the robbery. The trial court acknowledged that Defendant provided some assistance in the recovery of the stolen property but assigned little weight to this factor. After considering the applicable enhancement factors, the one mitigating factor, and the seriousness of the offense, the trial court sentenced Defendant to five and one-half years.

The trial court found that alternative sentencing was not appropriate and imposed a sentence of confinement. In so determining, the trial court considered the circumstances and seriousness of the offense, Defendant's poor employment history, his lack of remorse, and the lack of any indication that Defendant appreciated the seriousness of his offense.

**II. Length of Sentence**

As a Range I, standard offender, Defendant was subject to a sentence of between three and six years for his Class C felony conviction. T.C.A. § 40-35-112(b)(3). On appeal, Defendant does not challenge the trial court's consideration of enhancement factors (1), (2), or 6). Defendant argues, however, that the trial court improperly applied enhancement factor (5) based on a finding that the victim was treated with exceptional cruelty in determining the length of his sentence. See T.C.A. § 40-35-114(5). Defendant also submits generally that the length of his sentence does not fit either the crime or the offender, and argues, therefore, that the five and one-half year sentence imposed by the trial court violates the principles of Tennessee's Sentencing Act. See id. §§ 40-35-102(1); 40-35-103(2), (3).

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is improper. See T.C.A. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401(d). This presumption of correctness, however, "'is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.'" State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting State v. Ashby, 823 S.W.2d 166, 169 Tenn. 1991)). "If, however, the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails," and our review is de novo. Carter, 254

S.W.3d at 345 (quoting State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992); State v. Pierce, 138 S.W.3d 820, 827 (Tenn. 2004)).

A trial court is mandated by the Sentencing Act to "impose a sentence within the range of punishment." T.C.A. § 40-35-210(c). A trial court, however, "is no longer required to begin with a presumptive sentence subject to increase and decrease on the basis of enhancement and mitigating factors." Carter, 254 S.W.3d at 346. Therefore, an appellate court is "bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." Id.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. T.C.A. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

Enhancement factors must be "appropriate for the offense" and "not themselves essential elements of the offense." T.C.A. § 40-35-114. Accordingly, enhancement factors based on facts which are used to prove the offense or which establish the elements of the offense are excluded. State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997). As our supreme court has explained:

> proper application of enhancement factor (5) requires a finding of cruelty under the statute "over and above" what is required to sustain a conviction for an offense. See State v. Embry, 915 S.W.2d 451, 456 (Tenn. Crim. App. 1995); see also Poole, 945 S.W.2d at 98 (requiring the facts in a case to "support a finding of 'exceptional cruelty' that demonstrates a culpability distinct from and appreciably greater than that incident to" the crime). In other words, such evidence must "denote[ ] the infliction of pain or suffering for its own sake or from the gratification derived therefrom, and not merely pain or suffering inflicted as the means of accomplishing the crime charged." State v. Haynes, No. W1999-01485-CCA-R3-CD, 2000 WL 298744, at *3 (Tenn. Crim. App. filed at Jackson, Mar. 14, 2000).

State v. Arnett, 49 S.W.3d 250, 258-59 (Tenn. 2001).

Defendant entered a plea of guilty to robbery which is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." T.C.A. § 39-13-401(a). Defendant argues that the personal defense spray was the means by which he accomplished the offense and was not used to cause pain for its own sake or for gratification. Ms. Sweeney testified at the sentencing hearing that she was not frightened before the offense because

she assumed Defendant was a patient. Thus, Defendant's conduct of spraying Ms. Sweeney with a personal defense spray was used by the State to support a finding that Defendant committed the robbery by violence, and accordingly this conduct cannot support application of enhancement factor five. Poole, 945 S.W.2d at 98.

Even though this enhancement factor was improperly considered, however, it does not necessarily lead to a reduction in Defendant's sentence. See State v. Winfield, 23 S.W.3d 279, 284 (Tenn. 2000) (observing that the wrongful application of one or more enhancement factors by the trial court does not necessarily lead to a reduction in the length of the sentence). Defendant does not challenge the applicability of the other three enhancement factors, and the trial court placed the greatest weight on Defendant's role as a leader in the commission of the offense. The trial court considered the transcript of the guilty plea submission hearing, the testimony presented at the sentencing hearing and the principles of sentencing. In determining the length of Defendant's sentence, the trial court considered the remaining three enhancement factors, the little weight attributed to the one mitigating factor, and the seriousness of the offense. Based on our review, we conclude that the sentence of five years and six months was imposed in a manner consistent with the purposes and principles set out in sections 40-35-102 and 40-35-103 of the Sentencing Act. We are, therefore, bound by the trial court's decision as to the length of the sentence. Defendant is not entitled to relief on this issue.

**III. Denial of Request for Alternative Sentencing**

Our sentencing law provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(5), (6) (emphasis added). In determining whether to deny alternative sentencing and impose a sentence of total confinement, the trial court must consider if:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant....

T.C.A. § 40-35-103(1); see also Carter, 254 S.W.3d at 347. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is

imposed. T.C.A. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence.

The determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. See State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App.1995), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant is required to establish his suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general. State v. Mounger, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); see T.C.A. 40-35-303(b) (2006); Bingham, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will subserve the ends of justice and the best interest of both the public and the defendant. State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), overruled on other grounds by Hooper, 29 S .W.3d at 9. As the Sentencing Commission points out, "even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." Id. § 40-35-303, Sentencing Comm'n Cmts.

In the instant case, Defendant was convicted of a Class C felony and sentenced as a Range I, standard offender. He is, therefore, considered a favorable candidate for alternative sentencing. In considering Defendant's request for alternative sentencing, the trial court regarded Defendant's prior criminal history, his poor employment history, and his lack of remorse for the commission of the offense. Specifically, the trial court stated that "[w]hat disturbs the Court is he was cavalier about what happened and in the Court's mind didn't show any remorse or demonstrate any reflection about the seriousness of this crime." Based on these factors and a finding that confinement was necessary to avoid depreciating the seriousness of the offense, the trial court denied imposing any form of alternative sentencing.

Based on our review, we conclude that the trial court did not abuse its discretion in denying Defendant's request for probation or some other form of alternative sentencing. Defendant is not entitled to relief on this issue.

## CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE